

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's own motion,)	
to facilitate the implementation of the Federal)	
Communications Commission's Triennial Review)	Case No. U-13796
determinations in Michigan.)	
_____)	

In the matter, on the Commission's own motion,)	
to investigate and to implement, if necessary)	Case No. U-13891
a batch cut migration process.)	
_____)	

At the March 15, 2004 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. J. Peter Lark, Chair
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

ORDER DENYING MOTION TO TEMPORARILY STAY

On March 9, 2004, SBC Michigan (SBC) filed a motion to temporarily stay all Triennial Review proceedings. The foundation for SBC's motion was the ruling by the U.S. Court of Appeals for the D.C. Circuit that several aspects of the Federal Communications Commission's (FCC's) Triennial Review Order (TRO) are unlawful, including the FCC's sub-delegation of certain impairment decisions to state commissions.¹ SBC argues that because this Commission has initiated these proceedings pursuant to the FCC's rules that have been declared unlawful, it would be wasteful and imprudent to proceed at this time. Specifically, SBC requests that all of the

¹ See, United States Telecom Ass'n v FCC, Nos. 00-1012 (consol.), 2004 WL 374262 (CADC March 2, 2004) (USTA II).

Commission's Triennial Review proceedings be stayed until the later of the denial of any petition for rehearing en banc or until May 1, 2004 (the expiration of the stay ordered by the U.S. Court of Appeals for the D.C. Circuit, 60 days from the issuance of USTA II). Furthermore, SBC requests that the Commission establish a status hearing to be held in 60-90 days to discuss how to proceed. SBC contends that no party will be harmed or prejudiced by a temporary delay.

On March 12, 2004, numerous parties filed responses to the motion. Without exception, the responding parties urged the Commission to deny SBC's motion to temporarily stay these proceedings.² The reasons in favor of denying SBC's motion generally fall into four broad categories.

First, several parties express concern that Administrative Law Judge James N. Rigas (ALJ) does not possess the requisite authority to grant the motion given that the proceeding was commenced by the Commission. AARP, ¶ 1; Joint CLECs, pp. 2-6; CLECA, p. 1; Sage, pp. 1-3. Absent Commission action, they argue, the case should proceed.

Second, many parties assert that the USTA II opinion is not yet effective and, most likely, further stays will be sought and granted. AARP, ¶ 2; Joint CLECs, pp. 7-10; Joint Commenters, p. 3; Bullseye, ¶¶ 3 and 4; MCI, pp. 1-4; Sage, p. 3; Coalition, pp. 2-4. There are numerous examples cited where parties have publicly stated their desire to appeal the USTA II decision, including Commissioner Nelson on behalf of the NARUC Telecommunications Committee.

²Parties responding in opposition to SBC's motion are: AARP; AT&T Communications of Michigan, Inc., TCG Detroit, and Covad Communications Company (collectively, Joint CLECs); ACN Communications Services, Inc., Z-Tel Communications, Inc., and Talk America, Inc. (collectively, Joint Commenters); Bullseye Telecom, Inc. (Bullseye); the Competitive Local Exchange Carriers Association of Michigan (CLECA); MCI Metro Access Transmission Services LLC, and MCI WorldCom Communications, Inc., and Brooks Fiber Communications of Michigan, Inc. (collectively, MCI); Sage Telecom, Inc. (Sage); LDMI Telecommunications, Inc., TelNet Worldwide, Inc., Quick Communications, Inc., d/b/a Quick Connect USA, Superior Technologies, Inc., d/b/a/ Superior Spectrum, Inc., CMC Telecom, Inc., and Zenk Group, LTD, d/b/a/ Planet Access (collectively, Coalition).

Moreover, while the opinion is stayed, parties contend that the FCC's rules remain in effect and SBC's motion is premature.

Third, certain parties argue that the Commission has the ability to conduct these proceedings on its own and has much to learn from them. AARP, ¶¶ 3 and 4, Joint CLECs, pp. 6-7, 10-15; Joint Commenters, p. 3; Bullseye, ¶¶ 5-7; CLECA, p. 1; MCI, pp. 4-5; Sage, pp. 5-7; Coalition, p. 5. Arguably, the USTA II opinion addresses the sub-delegation of decision-making authority to the state commissions, not the conduct of proceedings. Consequently, this Commission may continue with its proceedings and rely upon that information in advising the FCC and in making its own state determinations. The opposing parties contend that the Commission has worked hard to develop pro-competition policies in this state and that staying these proceedings will deny the Commission an opportunity to consider important unbundling issues. Moreover, the Commission has independent state authority to move forward.

Fourth, many parties argue that they have already made significant investments in this proceeding and it would be prejudicial, harmful, and wasteful for it not to be completed. AARP, ¶ 5; Joint CLECs, p. 15; Joint Commenters, p. 2; Bullseye, ¶ 8; MCI, pp. 5-6; Sage, p. 7, Coalition, p. 2. The parties have already conducted discovery, pre-filed their testimony, and the hearings are set to begin. All that remains will be briefing and the Commission's consideration of the issues. To stop now, the opposing parties contend, would leave several factual disputes unresolved and would leave the Commission without critical input on important unbundling decisions. Additionally, to re-start these proceedings at some later point will necessarily mean that information will become stale, necessitating some duplication of effort to update the record.

On March 15, 2004, the Commission presided over an oral argument whereby the parties largely reiterated the positions presented in their motions. The Commission has found the

arguments to be insightful and helpful in making its determinations. After reviewing SBC's motion and the responses thereto, along with the oral arguments presented, the Commission finds that the motion to temporarily stay these proceedings should be denied.

Particularly key to the Commission's decision today is the consensus that there is no legal impediment for these proceedings to continue. SBC concedes this point. While there is a debate as to the legal implications of the stay of the vacatur in the USTA II decision on the FCC's TRO,³ all parties agree that the decision does not prevent state commissions from continuing to gather facts on the state of telephone competition and from continuing to provide whatever advice to the FCC that the FCC wishes to receive. Without regard to the current legal standing of the FCC's TRO, there is ample independent federal and state authority for these proceedings to continue.⁴

With that said, however, this Commission believes that it is no small consequence that the USTA II decision has been stayed and may, in fact, never take effect. While SBC cites authority that it believes stands for the proposition that USTA II is binding law upon publication, regardless

³Of considerable debate both in the pleadings and during oral argument is the legal effect of the USTA II decision in light of the fact that the court stayed its vacatur for 60 days. SBC argued that the USTA II ruling that certain aspects of the FCC's TRO are unlawful is authoritative despite the fact that the mandate has not yet issued. SBC's Motion, pp. 6-7, citing, Chambers v United States, 22 F3d 939, 942 n. 3 (CA9 1994); Yong v INS, 208 F3d 1116, 1119 n. 2 (CA9 2000); Finberg v Sullivan, 658 F2d 93, 97 n. 5 (CA3 1981); McClellan v Young, 421 F2d 690, 691 (CA6 1970); AT&T Communications v BellSouth Telecommunications, Inc., C/A No. 3:97-2164-17, slip op. at 14 (D. S.C. Aug. 14, 2000). The Joint CLECs and others, however, assert that the USTA II decision finding that certain aspects of the FCC's TRO are unlawful is not final until the mandate issues. Joint CLECs, pp. 7-8, citing, Bryant v Ford Motor Co., 888 F2d 1526, 1529 (CA9 1989) (quoting Mary Ann Pennsiero, Inc. v Lingle, 847 F2d 90, 97 (CA3 1988)); First Gibraltar Bank, FSB v Morales, 42 F3d 895 (CA5 1995); Clarke v United States, 915 F2d 699, 707 (CA10 1990); Alphin v Henson, 552 F2d 1033, 1035 (CA4 1977); cf. Qualcomm, Inc. v FCC, 181 F3d 1370, 1378-79 (CA10 1999). See also, Sage, pp. 5-6 and Coalition, pp. 2-4.

⁴See, Joint CLECs, pp. 13-15, Bullseye, ¶¶ 5-7, MCI, pp. 4-5; Sage, pp. 6-7, citing various provisions of the Michigan Telecommunications Act, MCL 484.2101 et seq., and the federal Telecommunications Act of 1996, 47 USC 151 et seq. Additionally, the USTA II opinion itself provides that "a federal agency may turn to an outside entity for advice and policy recommendations." USTA II, p. 17 (slip op.).

of whether the court's mandate has actually issued, other parties take issue with SBC's analysis.⁵

The Commission finds the critiques of SBC's authority well taken. The fact that the U.S. Court of Appeals for the D.C. Circuit decided to stay its vacatur is an important aspect of our decision today despite our finding that we have independent authority to proceed. The Commission believes it important to proceed on the law as it stands today.

The Commission also found insightful SBC's election to focus not so much on the legal ramifications of the USTA II decision, but on the significant waste of resources proceeding at this time would entail. While SBC conceded that fact-finding about the state of telephone competition in Michigan is an appropriate task for this Commission, SBC was concerned with the uncertain legal standard to which those facts would be applied. Consequently, SBC argued that any record developed today would necessarily require a supplemental filing once the legal standards become clearer. SBC argued that it would be less wasteful for the Commission to wait for greater legal clarity before continuing.

The Commission notes, however, that the parties are ready to proceed today with the previously scheduled hearing. A significant amount of discovery has been conducted, volumes of testimony have been pre-filed, and expert witnesses have been prepared and have traveled to Michigan to begin today's hearing. Much of the work that SBC argues will be wasted by continuing has already been performed. In fact, AARP argued that 85-90% of the evidence has been prepared and is simply awaiting input into the record. Moreover, the competitive local exchange carriers (CLECs) are uniform in their commitment to proceed and argue that the real waste of resources would come if SBC's motion were granted.

⁵See, Sage, pp. 5-6 and Coalition, pp. 2-4.

The Commission finds the CLECs' position to be more persuasive. The Commission does not believe that the work performed thus far should be lost or that continuing would require an unreasonable use of additional resources. Delaying these proceedings would necessarily mean that information would become stale and the investment required to prepare for today's hearings would need to be re-invested. The Commission also believes that there may be great benefit from learning what these proceedings will show about the state of telephone competition in Michigan. Consequently, the Commission directs the ALJ to continue with the docketed hearings for the purpose of developing a useful record.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq.
- b. The March 9, 2004 motion to temporarily stay all Triennial Review proceedings should be denied.

THEREFORE, IT IS ORDERED that the March 9, 2004 motion to temporarily stay all Triennial Review proceedings is denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chair

(S E A L)

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of March 15, 2004.

/s/ Mary Jo Kunkle
Its Executive Secretary

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Suggested Minute:

“Adopt and issue order dated March 15, 2004 denying SBC Michigan’s motion to temporarily stay all Triennial Review proceedings, as set forth in the order.”